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Silicon Intern. Ore, LLC v. Monsanto Co. Appellant's Reply Brief Dckt. 39409

IN THE SUPREME COURT OF THE STATE OF IDAHO

SILICON INTERNATIONAL ORE, LLC,

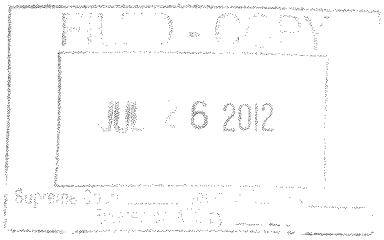
Plaintiff/Appellant,

vs.

MONSANTO COMPANY and WASHINGTON GROUP INTERNATIONAL, INC.,

Defendants/Appellees.

Supreme Court No. 39409-2011



REPLY BRIEF OF PLAINTIFF/APPELLANT SILICON INTERNATIONAL ORE, LLC

Appeal from the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Caribou

Honorable Mitchell W. Brown, District Judge, presiding

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Plaintiff/Appellant Silicon International Ore, LLC ("SIO"), by and through counsel, respectfully submits this Reply Memorandum.

I. INTRODUCTION

Defendants/Appellants Monsanto Company ("Monsanto") and Washington Group International, LLC ("WGI") do not succeed in demonstrating to this Court that the district court's ruling—that no disputed issues of material fact exist, and that Monsanto and WGI are entitled to judgment as a matter of law on all of SIO's claims—was correct. Significant issues of fact inhere in the nature of the SIO/Monsanto contract, including the application of the statute of frauds. Monsanto did not even seek summary judgment on SIO's claims for equitable estoppel. Contrary to WGI's argument SIO did submit evidence of damages on summary judgment, and the district court's sua sponte grant of summary judgment was prejudicial on a procedural level and incorrect on a substantive level. Finally, the March 14, 2008, email of Mitchell Hart ("Hart") is probative , trustworthy, and necessary, particularly on summary judgment.

This Court should reverse the district court's decision and remand this case to the district court for further discovery and trial.

II. ARGUMENT

A. Monsanto Offers No Persuasive Reason for Affirming the District Court's Grant of Summary Judgment on SIO's Breach of Contract Claim.

1. On its face, the SIO-Monsanto contract does not encompass a sale of goods for $500 or more.

Monsanto contends that Appellant Silicon International Ore, LLC ("SIO") "has never argued that the verbal agreement was for less than $500 and has waived any challenge to

this [implicit] finding" by the district court "by not raising it on appeal." Resp.'s Br. at 26. That is wrong. On page 17 of its opening brief, SIO explained its contract with Monsanto as follows:

> Critically, despite the SIO/Monsanto contract's contemplation of a royalty based on the quantity of finished sand SIO sold, that does not make the contract one for the "sale" of goods for $500.00 or more. The evidence before the district court on summary judgment was that Monsanto did not sell sand to SIO, but that it merely furnished sufficient sand to SIO, which processed and sold that sand and paid Monsanto a royalty based on the quantity of processed sand that SIO sold. SIO's contract with Monsanto was not defined by the price of sand sold, per quantity, by Monsanto to SIO as with the sale of goods. Most importantly, SIO did not pay Monsanto at all just because it received sand from Monsanto. Rather, it paid Monsanto for the processed sand SIO sold. If SIO sold no sand, it did not pay Monsanto.

Appellant's Br. at 17. Not only did SIO make that argument in its opening brief, it made it in the district court as well. R. Vol. 3, p. 384; Tr of May 13, 2011, Hrg. at 45–46. SIO has not waived this argument.

On its merits, SIO's argument on this issue is meritorious and requires reversal. That a contract is "for the sale of goods," as Monsanto emphasizes in its argument, is not enough to mandate application of the statute of frauds. The goods must actually be sold "for the price of $500 or more." *See* IDAHO CODE § 28-2-201(1). Monsanto's argument ignores, entirely, the price term of the SIO/Monsanto contract. Todd Sullivan's ("Sullivan") testimony characterized SIO's payment obligation as a "royalty" rather than a "price." R. Vol. 3, pp. 438–39. Hart—who was Monsanto's "point contact" with SIO at all relevant times—did too. R. Vol. 3, pp. 439, 443–46. The addendum (the "Second Addendum") to the Second Quartzite Agreement (the "Second Quartzite Agreement") between Monsanto and WGI specified that the royalty would be

calculated based on processed sand sold by SIO. R. Vol. 4, pp. 564–65. This is the payment structure that SIO has always alleged—and for which it submitted evidence that, in the district court, went undisputed.

This evidence answers the question that Monsanto, in its brief, refuses to answer, let alone ask: what was the "price" of the sand that SIO acquired from Monsanto? The answer is that there was *no* price fixed based on the quantity of sand that Monsanto delivered to SIO. Rather, SIO would pay Monsanto only for sand that SIO ultimately processed and sold to a third party. The amount of payment turned on the amount of sand SIO actually sold to a third party. If SIO sold no sand, it did not pay Monsanto anything. The undisputed reality was that SIO did not buy sand from Monsanto. Monsanto effectively gave it (previously, Monsanto was merely disregarding it) to SIO in the hope that it would be repaid in the form of a royalty based on whatever processed sand SIO ultimately sold. This makes sense: the undisputed evidence before the district court was that making money off the sand was not even Monsanto's priority. Rather, Monsanto considered the sand a waste product that it needed to get rid of. R. Vol. 4, p. 508. Critically, in the district court, Monsanto did not dispute *any* of this evidence.

It is therefore no small wonder that Monsanto attempts to obfuscate SIO's argument by claiming that SIO somehow waived it. SIO did not waive it, and the argument itself commands reversal.

2. Even if the SIO/Monsanto contract encompassed a sale of goods for $500 or more, issues of fact surround whether that is the predominant factor of the contract.

Monsanto concedes, as it must, that "[t]he question of whether goods or services predominate in a hybrid contract is one of fact." Resp.'s Br. at 25; *see Allmand Assocs., Inc. v. Hercules Inc.*, 960 F. Supp. 1216, 1223 (E.D. Mich. 1997). But Monsanto then argues that "where there are no genuine issues of material fact regarding the provisions of the alleged contract, the district court may resolve the issue as a matter of law." *See id.* Monsanto applies that principle, and the hybrid contract inquiry, too narrowly.

Allmand—the case upon which Monsanto principally relies—specifies as follows:

> When faced with a mixed goods-services situation, Michigan courts employ a "predominant factor" test and assess the overall impetus of the parties' dealings. *If the parties' thrust, their purpose*, reasonably stated, is the rendition of goods, with services incidentally involved then the U.C.C. is applicable . . . . On the other hand, if the parties entered a service transaction with goods incidentally involved, then the U.C.C. . . . [has] no application. *Essentially, what the court is searching for is whether the sale of goods or sale of services is the* raison d'etre *of the agreements upon which the . . . claim is based.*

Allmand, 960 F. Supp. at 1223 (emphasis added). This is consistent with the analysis employed by Idaho courts. *See Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 709, 52 P.3d 848, 854 (2002) (mandating an inquiry into the "entire transaction" to determine which aspect predominates); *Pittsley v. Houser*, 125 Idaho 820, 822, 875 P.2d 232, 234 (Ct. App. 1994) (requiring consideration of the contract "in its entirety" and an assessment of the contract terms' "thrust" and "purpose").

Courts nationwide—applying the same test as the Idaho courts in *Fox* and *Pittsley* did—have adopted a fact-specific inquiry for determining the predominant factor of a contract. In *BMC Indus., Inc. v. Barth Indus. Inc.*, 160 F.3d 1322 (11th Cir. 1998), the Eleventh Circuit Court of Appeals stated as follows:

> Although courts generally have not found any single factor determinative in classifying a hybrid contract as one for goods or services, courts find several aspects of a contract particularly significant. First, the language of the contract itself provides insight into whether the parties believed the goods or services were the most important element of their agreement. Contractual language that refers to the transaction as a "purchase," for example, or identifies the parties as the "buyer" and "seller," indicates that the transaction is for goods rather than services.
>
> Courts also examine the manner in which the transaction was billed; when the contract price does not include the cost of services, or the charge for goods exceeds that for services, the contract is more likely to be for goods.
>
> Movable goods is another hallmark of a contract for goods rather than services.

See id. at 1330 (citations omitted). In *BMC*, the Eleventh Circuit ruled based, in part, on "the circumstances surrounding the [contract]." *See id.* at 1331.

In *Trevillyan v. APX Alarm Sec. Sys., Inc.*, Case No. 2:10-1387-MBS, 2011 U.S. Dist. LEXIS 694 (D.S.C. Jan. 3, 2011) (unpublished disposition), the court identified three relevant factors: "(1) the language of the contract; (2) the nature of the business of the supplier; and (3) the intrinsic worth of the materials involved." *See id.* at *15. Considering that the business of the supplier was to provide alarm monitoring services, that the provision of any goods was simply to effectuate the provision of those services, and that the intrinsic worth of the

furnished goods was nominal, the court concluded that a contract for the sale of alarm equipment and subsequent monitoring was one for services. *See id.* at *15–*16.

Importantly, the very case upon which Monsanto bases its argument, *Allmand*, identifies the following as relevant factors: "language of the parties' agreements, the circumstances surrounding their execution, and the allocation between costs of materials and services and the relative cost of goods to the total contract prices." *See Allmand*, 960 F. Supp. at 1223. It was after identifying those factors that the *Allmand* court noted that summary judgment may be appropriate where "there is no genuine issue of material fact in dispute regarding the provisions of the contract." *See id.*

The fact that courts consider elements like "the circumstances surrounding the [contract]," the "nature of the business of the supplier," the "intrinsic worth of the goods," and the "purpose" and "thrust" of the contract—all explicitly in addition to the contractual language—indicates that, for a court to grant summary judgment on this fact-intensive issue, *all* facts pertaining to *all* those issues must be undisputed. When *Allmand* and other cases say that summary judgment may be appropriate where there is no genuine issue of fact "regarding the provisions of the contract," they mean it broadly: not only the provisions themselves, but their purpose, the facts surrounding them, the nature of the parties' business, and other such factors. Monsanto takes an improperly narrow view of the definition of facts "regarding the provisions of the contract."

The district court did not undertake that analysis, but the facts before the district court reveal numerous issues of material fact that precluded summary judgment on this issue. In his deposition,[1] David Farnsworth ("Farnsworth") testified as follows:

> Q. What's your recollection of what SIO's proposal was at those initial stages when they were talking with Mitch?
>
> A. The initial—the best of my memory, the initial proposal was that they would purchase raw sand from us and take it to a site of their own for processing.
>
> Q. Did you have any reaction or opinion as to that proposal?
>
> A. We were generally favorable.
>
> Q. Are you aware of how the discussions preliminary [*sic*] progressed between SIO and Monsanto regarding that?
>
> A. Just in a general nature. Very shortly after the start of those discussions SIO indicated that—for whatever reason, I don't remember—that they were unable or didn't want to have a site of their own and whether they could build the facility on our site.

R. Vol. 4, p. 628. In other words, the evidence before the district court was that it was material not only for SIO to acquire access to Monsanto sand, but to process it on Monsanto's premises. The record suggests that, for SIO, the two were intertwined and inseparable.

Even looking at the terms of the SIO/Monsanto contract as SIO described it, only two terms even addressed sand: that "Monsanto would furnish SIO with certain agreed-upon

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[1] Farnsworth's complete deposition testimony was before the district court on summary judgment. R. Vol. 3, p. 470; R. Vol. 5, p. 617. Farnsworth was intimately involved in Monsanto's dealings with SIO relative to SIO's operations.

quantities of sand," and that "SIO would pay Monsanto royalties in agreed-upon amounts. R. Vol. 3, pp. 438–39. All of the remaining terms dealt with SIO's operations on Monsanto's premises, as well as *how* SIO would sell processed sand: (1) the sand must be processed and improved in a safe and environmentally sound manner; (2) Monsanto could limit the markets into which SIO would sell the sand; (3) Monsanto could designate locations from which SIO could extract sand; and (4) SIO must conform to Monsanto's environmental, safety, and control regulations. R. Vol. 3, pp. 438–39. Nowhere in Sullivan's characterization of the SIO/Monsanto contract did he use the words "buy" or "purchase" sand, even if that was the intent when SIO and Monsanto commenced negotiations. R. Vol. 3, pp. 438–39. Rather, he specifically noted that Monsanto would merely "*furnish* SIO with certain agreed-upon quantities of sand," and that SIO would compensate Monsanto in the form of a royalty. R. Vol. 3, pp. 438–39 (emphasis added). Indeed, Hart further confirmed that the royalty Monsanto would receive would be "for similar value *as if they would have sold raw sand.*" R. Vol. 3, pp. 439, 445–46 (emphasis added). Plainly, Hart—Monsanto's "point contact"—did not consider it a sale of sand.

The mechanism of payment to Monsanto also cuts against a conclusion that Monsanto was "selling" goods. SIO did not—and Monsanto has gone to great pains in this litigation to argue that SIO did not—pay Monsanto directly. Rather, SIO paid WGI, Monsanto's longtime mining contractor (and, not incidentally, the provider of *support services* to SIO, per Monsanto's requirement), and WGI passed on Monsanto's royalty to Monsanto. R. Vol. 4, pp. 649.

Moreover, the record before the district court demonstrates that Monsanto is not even in the business of selling its remnant sand. R. Vol. 3, pp. 439, 443–46 (selling sand was not a "core business" for Monsanto). Indeed, the sand itself was a byproduct of Monsanto's operations. R. Vol. 3, pp. 439, 443–46. Monsanto needed to dispose of the sand in order to ensure enough space on its worksite; it did not primarily even wish to make money off of it. R. Vol. 4, p. 508. Monsanto's intent and purpose was not to make money off the sand as a "sale," but simply to get rid of it, and hopefully make money in the process.

Every Idaho case that Monsanto cites involved a trial on the issue of "predominant factor," not a resolution on summary judgment. *See, e.g.*, *Fox*, 137 Idaho at 706, 52 P.3d at 851 (noting that district court held a "court trial"); *Pittsley*, 125 Idaho at 821, 875 P.2d at 233 (trial held before magistrate judge); *United States v. Twin Falls*, 806 F.2d 862, 866 (9th Cir. 1986) (jury trial). Critically, it appears that no Idaho appellate decision affirms a resolution of this issue on summary judgment where it was a principal issue pertaining to liability.[2]

In fine, the circumstances surrounding the SIO/Monsanto contract, as well as the terms of the contract itself, reveal numerous issues of fact. The district could not conclude, as a matter of law, that the SIO/Monsanto contract was one for goods. Summary judgment was inappropriate, and this Court should reverse.

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[2] In *Ward v. Puregro Co.*, 128 Idaho 366, 913 P.2d 582 (1996), the Idaho Supreme Court affirmed a decision handed down on summary judgment where the district court had applied the "predominant factor" analysis to determine whether a contract was subject to the Uniform Commercial Code for purposes of a choice of law analysis, not whether the statute of frauds applied, and not to determine ultimate liability. *See id.* at 368–69, 913 P.2d at 584–85.

3. Even if the Court could construe the SIO/Monsanto contract as a matter of law, it is not predominantly a contract for the sale of goods.

For all of the reasons set forth *supra*, even if this Court were to render a conclusion, as a matter of law, regarding the predominant factor of the SIO/Monsanto contract, that conclusion, inescapably, must be that the sale of goods did not predominate, and the statute of frauds did not apply. The balance of factors set forth in *Allmand*, *BMC*, and *Trevillyan* all compel a conclusion that the SIO/Monsanto contract is not predominantly for the sale of goods and is therefore not governed by the UCC or its statute of frauds.

4. Issues of fact surround whether the SIO-Monsanto contract is vague or indefinite.

Although the district court held that "very likely triable issues of fact" existed regarding the alleged vagueness and indefiniteness of the SIO/Monsanto contract, R. Vol. 5, p. 86, Monsanto argues that the district court's holding in that regard was erroneous, and that the SIO/Monsanto contract is too vague and indefinite to be enforceable. Monsanto's argument ignores the well-accepted rule that "the existence of a sufficient meeting of the minds to form a contract is a question of fact to be determined by the trier of fact." *See Shields & Co. v. Green*, 100 Idaho 879, 882, 606 P.2d 983, 986 (1980); *see also Lamprecht v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003) ("In determining the intent of the parties, [a court] must view the contract *as a whole*." (emphasis added)). Monsanto's argument also ignores the rule, codified in statute, that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." *See* IDAHO CODE § 28-2-204.

This is, indeed, an issue of disputed fact. Contrary to Monsanto's argument, the SIO/Monsanto contract is not, by its terms, for an unlimited duration. Indeed, the evidence before the district court was that it most certainly terminates when the contract ceases to be of "mutual benefit," which turned upon the occurrence of any one of a number of factors: (1) SIO fails to conform to Monsanto's environmental, safety, and control regulations; (2) SIO fails to pay royalty payments; or (3) SIO sold sand in markets that Monsanto did not approve. R. Vol. 3, pp. 438–39. Of course, the "benefit" of the contract was largely inherent in the arrangement itself: no matter how much sand SIO actually processed and sold, Monsanto would rid itself of a waste product, get paid some money for it, and not have to commit any resources to that process. R. Vol. 3, pp. 439, 445–46; R. Vol. 4, p. 508. The evidence before the district court was that the duration of the SIO/Monsanto contract was to be "long-term," and that Monsanto would not "abruptly" terminate the contract. R. Vol. 3, pp. 439–40. Regardless of whether Monsanto ultimately violated that understanding, the terms of the contract itself unambiguously said when the contract would end.

Moreover, again contrary to Monsanto's argument, the SIO/Monsanto contract *did* establish the amount of royalty payments. Monsanto's December 2, 2002, letter to WGI sets "represent[ed] royalies "agreed to by [SIO] as fair and reasonable and accepted by [Monsanto]." R. Vol. 4, p. 656. Further, the Second Addendum sets forth royalty rates and explicitly references SIO's involvement. R. Vol. 4, pp. 566–68. Monsanto myopically views Sullivan's recitation of the SIO/Monsanto contract's general terms as the only terms, but there can be no

dispute (and, indeed, there was no dispute in the district court) that SIO and Monsanto ultimately did agree on royalty rates, that SIO paid them, and that Monsanto received them.

Regarding quantity, although Monsanto is correct that the SIO/Monsanto contract was not, strictly speaking, a requirements contract, the law recognizes contracts of indefinite quantity. Monsanto has never, in the district court or this court, contended that it did not know how much sand to furnish SIO. "A meeting of the minds is evidenced by a manifestation of intent to contract which takes the form of an offer and acceptance." *Barry v. Pac. W. Constr., Inc.*, 140 Idaho 827, 831, 103 P.3d 440, 444 (2004). Monsanto offers no explanation for how it could operate for seven years, and know for seven years how much sand to furnish SIO, without having accepted some sort of offer by SIO sufficient to evidence a meeting of the minds between the two.

On this point, the district court was correct—Monsanto was not, and is not, entitled to summary judgment on the ground that the SIO/Monsanto contract was vague and indefinite.

B. Monsanto Offers No Persuasive Reason for Affirming the District Court's Grant of Summary Judgment on SIO's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

Monsanto's arguments address SIO's claims for breach of contract and breach of the implied covenant of good faith and fair dealing as if they were one claim. For the same reasons that the Court should reverse summary judgment on SIO's breach of contract claim, it should do so on SIO's claim for breach of the implied covenant.

C. The Court Should Reverse the District Court's Grant of Summary Judgment on SIO's Claims for Equitable Estoppel and Quasi-Estoppel.

1. Monsanto did not seek summary judgment on SIO's claims for equitable estoppel and quasi-estoppel.

Contrary to Monsanto's argument, it plainly did not seek summary judgment on SIO's claims for equitable estoppel and quasi-estoppel. Its initial summary judgment brief was silent on those claims. R. Vol. 1, p. 82. In its reply memorandum, Monsanto argued that it was entitled to summary judgment on those claims, but it did not even try to argue that it had addressed those claims in its initial memorandum. R. Vol. 5, pp. 734–37. Rather, Monsanto addressed those claims as if it was briefing them for the first time, which, of course, it was. R. Vol. 5, pp. 734–37.

Monsanto now argues that it *did* seek summary judgment on those claims in its initial memorandum, simply because it argued that the SIO/Monsanto contract was too vague and indefinite to be enforced. But as Monsanto itself concedes, equitable estoppel and quasi-estoppel claims are distinct claims with distinct elements. It is beyond doubt that "if the movant does not challenge an aspect of the nonmovant's case in that party's motion, the nonmovant is not required to address it at the summary judgment stage of the proceedings." *See Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). One would think that if Monsanto had challenged SIO's equitable estoppel and quasi-estoppel claims, it would have at least used those words somewhere in its opening memorandum on summary judgment. It did not.

Because Monsanto styled its motion, in the caption, as a complete motion for summary judgment, SIO included a brief statement of why Monsanto was not entitled to judgment on SIO's equitable estoppel and quasi-estoppel claims. But that does not mean that SIO had an opportunity to *respond* to any argument Monsanto made in that regard, or that Monsanto had met its "initial responsibility of determining those issues of [SIO's] case on which it intended to move for summary judgment." *See State v. Rubbermaid, Inc.*, 129 Idaho 353, 359, 924 P.2d 615, 621 (1996) (Trout, J., dissenting in part). Indeed, Monsanto's failure to "challenge an element" or to "present evidence establishing the absence of a general issue of material fact" means that the burden never shifted to SIO at all. *See Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The district court erred by granting summary judgment on these claims under these circumstances.

2. Even if Monsanto had sought summary judgment on the equitable estoppel and quasi-estoppel claims, the district court granted it on another ground altogether.

Even if Monsanto had sought summary judgment on SIO's equitable estoppel and quasi-estoppel claims, it did not do so on the ground that those claims were based on representations that were vague and indefinite. R. Vol. 5, pp. 734–37. Rather, it attacked virtually every other element of those claims. R. Vol. 5, pp. 734–37. The district court, on the other hand, granted summary judgment on the ground that the alleged representations were vague and ambiguous. R. Vol. 5, pp. 789–91. As SIO argued in its opening brief before this Court (and which, at least, WGI conceded was correct), a district court may not sua sponte raise and dispose of issues that neither of the parties raised in the district court on summary judgment.

Again, the district court erred by granting summary judgment on these claims under these circumstances.

3. The district court's dismissal of SIO's equitable estoppel and quasi-estoppel claims is wrong on the merits.

For all of the reasons set forth in SIO's initial memorandum, issues of fact surround whether Monsanto's representations were specific enough to support claims for equitable estoppel and quasi-estoppel. Notably, however, one elegantly simple point escapes Monsanto. The district court defined the "representation" giving rise to the estoppel claims as Hart's representation that Monsanto would not "abruptly" terminate the SIO/Monsanto relationship, and it concluded that representation was too vague to be enforceable. R. Vol. 5, pp. 790–92. But it simultaneously concluded that whether the SIO/Monsanto contract—which was an oral contract, ostensibly based on representations made by Monsanto, and containing a termination provision that was defined by conditions rather than a date certain—was vague and indefinite, and that it was beset by issues of disputed material fact that were unresolvable on summary judgment. R. Vol. 5, pp. 790–92. The district court's opinion on that issue is inconsistent, particularly given that the alleged SIO/Monsanto contract gives context to Hart's representation. The district court ignored the reality that the context of the alleged SIO/Monsanto agreement gives additional context, clarification, and substance to Hart's representation.

In *Exchange State Bank v. Taber*, 26 Idaho 723, 145 P. 1090 (1915), the Idaho Supreme Court held that:

> Where a party by conduct has intimated that he consents to an act which has been done or will offer no opposition thereto, though it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the action to the prejudice of those who have acted on the fair inference to be drawn from his conduct.

See id. at 737, 145 P. at 1094 (internal quotation marks omitted). Monsanto asks this Court to conclude that SIO's construction and operation of a processing facility on Monsanto's premises, Monsanto's furnishing of sand, SIO's payment of royalties, Monsanto's receipt of those royalties, and Monsanto's control over markets in which SIO sold finished sand, as well as other facts, do not constitute Monsanto's "intimation that [it] consents" to an arrangement with SIO. Plainly, those actions could not have been done without Monsanto's consent, as Monsanto owned the land and the sand and played an active role in SIO's business. Estoppel is a question of fact. *See Church v. Roemer*, 94 Idaho 782, 785 n.3, 498 P.2d 1255, 1258 n.3 (1972) ("Whether the doctrine of equitable estoppel should be invoked is ordinarily a question of fact which must be resolved at trial . . . ."); *see also id.* ("[W]here the trial court did not make any finding with reference to the question of estoppel, the appellate court cannot determine whether a party is estopped by his conduct."). There are more than enough facts in the record to make summary judgment on SIO's two estoppel-based claims inappropriate.[3]

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[3] This is critically important, as equitable estoppel itself can—and should in this case—function as an exception to the statute of frauds, as well as a substantive claim. *See Moen v. Minzel*, 79 Idaho 228, 233, 313 P.2d 1079, 1081 (1957) (recognizing, based on California law, a principle that "equitable estoppel prevents invocation of the statute of frauds where one party, in reliance on a parol contract which should have been reduced to writing, has changed his position

D. The Court Should Reverse the District Court's Grant of Summary Judgment in WGI's Favor on SIO's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

1. SIO clearly presented evidence of damages to the district court.

WGI effectively concedes that SIO offered evidence of damages in connection with its claim for breach of the implied covenant, but argues that SIO did not do so clearly enough for the district court to recognize and apply it. WGI is wrong. In its opposition memorandum, SIO referred to its interrogatory responses and even pointed the district court to the specific responses addressing the wash screen. R. Vol. 3, pp. 404–405. SIO referred to those interrogatory responses no less than nine times in that memorandum. R. Vol. 3, pp. 390–408.

In any event, WGI sought summary judgment on the issue of damages generally, arguing that SIO had sustained no damages because it had not disclosed any expert testimony. R. Vol. 2, pp. 256–59. But SIO did disclose expert testimony, and that testimony spoke to amounts SIO spent "in reliance upon Monsanto's representations and commitments." R. Vol. 3, p. 417. That testimony also included out-of-pocket costs for the "construction of storage facilities, acquisition of mobile equipment for moving and transporting silica, and equipment for washing it." R. Vol. 3, p. 419. Those figures—SIO's costs of doing business—speak to its damages as a result of WGI's breaches of the implied covenant of good faith and fair dealing inhering in the Master Agreement, as WGI made SIO's performance more expensive. That

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or parted with value so that injustice would result if the other party were permitted to plead such statute").

evidence was plainly disclosed in SIO's opposition memorandum. R. Vol. 3, pp. 396, 398, 399–400.

This case is nothing like *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009). There, the appellants failed to contest, entirely, a portion of the appellees' motion for summary judgment, but nevertheless argued on appeal that the district court should have combed the record anyway to ascertain material issues of fact. *See id.* at 103, 218 P.3d at 1164. Here, SIO not only opposed WGI's motion, but included evidence of damages and pointed the district court to specific pages where additional damages evidence was located.

2. The district court correctly held that disputed issues of fact surrounded WGI's duty to assist SIO by furnishing a screen.

As WGI concedes, the district court held that issues of fact surrounded whether SIO sought to impose extracontractual limitations on WGI. WGI focuses its argument exclusively on language in the Master Agreement stating that SIO "agrees to provide all necessary plant equipment to dry, screen, and bag the silica sand." But the Master Agreement also required WGI to take charge of "procurement of supplies for, and construction of," SIO's facility, as well as "installation, operation, and maintenance of [SIO's] equipment." R. Vol. 3, pp. at 450–52. Those provisions can be reconciled as a statement that SIO must fund the purchase of supplies, equipment, and facilities, but WGI will perform the actual work. To the extent they cannot be reconciled, the Master Agreement is ambiguous, and summary judgment is inappropriate for that additional reason. *See McDevitt v. Sportsman's Warehouse, Inc.*, 151

Idaho 280, 283, 255 P.3d 1166, 1169 (2011) ("Interpretation of an ambiguous contract is a question of fact.").

On summary judgment, SIO set forth a sworn enumeration, in its interrogatory responses, of instances in which WGI did not perform its obligation to procure supplies, construct, install, operate, and maintain SIO's facility:

> 1. WGI did not simply require SIO to furnish a screen, pursuant to the Master Agreement. Rather, *WGI* built the screen, but it did so in such a slow and inefficient manner that SIO sustained damage as a result.
>
> 2. WGI dragged its feet in constructing SIO's on-site facility.
>
> 3. WGI constricted SIO's ability to move about the Quarry to conduct its business.
>
> 4. WGI refused to procure a dump truck for SIO, and then when SIO obtained one (because it needed it), WGI restricted its use and then, ironically, asked SIO to lease the truck at an unreasonable rate.
>
> 5. WGI provided an inadequate backhoe, and SIO ultimately purchased its own.
>
> 6. WGI also provided an inadequate forklift; again, SIO bought its own.
>
> 7. WGI unnecessarily overcharged SIO on labor, nearly running SIO out of business.
>
> 8. Monsanto representatives informed SIO that WGI, not SIO, should have paid for and furnished equipment. Indeed, the Addendum to Second Quartzite Agreement makes WGI "responsible for all fees, taxes, utilities, *costs, and expenses* to *manage*, construct, *maintain*, insure, and *operate* the Facility."

R. Vol. 5, pp. 703–08. None of those actions are explicitly covered in the Master Agreement, but all of them, if proven, evidence WGI's failure to discharge its obligations in good faith. *See Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 750, 9 P.3d 1204, 1214 (2000) (noting that the implied covenant "requires that parties perform, in good faith, the obligations imposed by their agreement"). WGI would have the Court believe that it had *no* on-site obligations, but the record contains conflicting evidence on that subject. SIO is permitted a trial on this issue.

E. The Court Should Reverse the District Court's Grant of Summary Judgment on SIO's Claim for Tortious Interference Against WGI.

WGI concedes that the district court erroneously granted summary judgment *sua sponte* in its favor on SIO's tortious interference claims, but then argues that such error was harmless. WGI's argument makes little sense, as the very harm that SIO suffered was its inability to answer WGI's contentions in the district court, rather than in a court of review. Granting summary judgment *sua sponte* is "inconsistent with substantial justice," as it denies a party the obligation to meet an opponent's arguments head-on in district court. *See* IDAHO R. CIV. P. 61. WGI inexplicably faults SIO for appealing rather than seeking reconsideration, but even WGI does not seriously contend that SIO is not within its rights to have appealed.

Leaving that harm aside, WGI cannot prevail on its substantive arguments, either. First, it argues that SIO cannot offer evidence that WGI was aware of the SIO/Monsanto contract. But it has offered such evidence in spades. The Second Addendum, pertaining to an agreement between WGI and Monsanto, makes clear that (1) WGI maintains the processing plant on SIO's behalf, (2) SIO will sell the processed sand, (3) SIO will pay royalties based on sand

sold by SIO, and (4) title to sand will pass directly from Monsanto to SIO upon payment of the royalty. R. Vol. 4, pp. 564–68. Exhibits attached to the Second Addendum reference SIO's payment of royalties per weight of finished sand, as well as markets into which Monsanto has approved SIO's sale of finished sand product—terms that obviously have nothing to do with WGI. R. Vol. 4, pp. 566–68. Rosenbaum, a former WGI representative, testified in his deposition (which was a part of the record on summary judgment) that SIO paid WGI for royalty and services, and then it passed SIO's royalty payments to Monsanto. R. Vol. 4, pp. 649.

Moreover, on March 7, 2002, SIO, WGI, and Monsanto agreed that the applicable version of the Quartzite Agreement would be updated to reflect a royalty matrix consistent with the matrix SIO had submitted. WGI would, in turn, "update [its] agreement with SIO to parallel" the Monsanto-WGI agreement. R. Vol. 3, pp. 464–66. On or about December 2, 2002, Monsanto sent WGI a letter setting forth amounts that "represent[ed] royalties agreed to by [SIO] as fair and reasonable and accepted by [Monsanto]." R. Vol. 4, p. 656.

WGI somehow does not consider this to be evidence of its knowledge of a contract between SIO and Monsanto, but it does not set forth any other reason why SIO would be operating on Monsanto's property and obtaining Monsanto's sand in exchange for royalty payments agreed upon by SIO and Monsanto and delivered by SIO to Monsanto. It was undisputed in the district court that Monsanto (or its subsidiary) owned the ground upon which SIO conducted its business, as well as the sand that Monsanto provided to SIO. R. Vol. 4, pp. 585, 622. WGI also offers no explanation of why its inclusion on correspondence between SIO and Monsanto, as early as 2002, reflecting royalties "agreed to" and "accepted" by both SIO

and Monsanto means something other than it knew that such an "agreement" and "acceptance" had occurred. At the summary judgment stage, SIO did not have to prove that WGI knew of the SIO/Monsanto contract. It just had to set forth evidence *tending* to show that it did, and the district court was obligated to construe conflicting evidence, and to draw all reasonable inferences, in SIO's favor. *See Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009).

Second, as explained above, significant disputed issues of fact surround the vagueness and definiteness of the SIO/Monsanto contract. The district court's conclusion on that subject was correct.[4]

F. The Court Should Reverse the District Court's Exclusion of Hart's March 14, 2008, Email.

Both Monsanto and WGI claim that the district court correctly excluded Hart's March 14, 2008, email because although Hart addressed that email in detail in his deposition, and SIO included Hart's deposition transcript on summary judgment, SIO did not include the email as an exhibit *to the deposition transcript*, but rather as an exhibit to Sullivan's declaration. Such hypertechnicality is precisely what the residual exception to the hearsay rule was designed to prevent.

The residual exception provides as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is

[4] SIO does not contend that WGI tortuously interfered with its own contract with SIO. Rather, it contends that it interfered with the SIO/Monsanto contract.

> offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

See IRE 803(24). This rule "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined." *See* IRE 102. "The principal purpose underlying the policy behind the hearsay rule is" simply "to assure that testimony of assertions shall be subjected to cross-examination." *See State v. McPhie*, 104 Idaho 652, 655, 662 P.2d 233, 236 (1983). That goal is obviously less material on summary judgment, where the district court does not even take testimony, let alone cross-examination.

Hart's email is trustworthy. "[T]he spontaneity of the statement, the consistency of repetition, the mental state of the declarant and the lack of motive to fabricate" are nonexclusive "indicators of trustworthiness." *See State v. Gray*, 129 Idaho 784, 792, 932 P.2d 907, 915 (Ct. App. 1997). Hart wrote the March 14, 2008, email as the culmination of a series of three emails that he wrote to Sullivan, all of which are consistent in identifying a contract between SIO and Monsanto. R. Vol. 3, pp. 439, 443–46. Hart spent two days formulating his January 17, 2008, email, and his March 6, 2008, email represent some "push back" against Sullivan's request for written confirmation of Hart's understanding. R. Vol. 4, p. 513. The content of the March 14, 2008, email is indisputably correct. And Hart *admits* sending all three

emails, including the March 14, 2008, email, to Todd Sullivan, and in his deposition, he extensively verified the content of the March 14, 2008, email. R. Vol. 4, pp. 510–16. Monsanto and WGI participated in Hart's deposition, where the email was a substantive subject raised and discussed. Sullivan confirms receiving that email in the very same format that Hart admits sending them. *See* R. Vol. 4, pp. 439, 447–48. There is no dispute whatsoever that the emails that SIO has proffered are true and correct copies of the very emails that Hart sent, and which Sullivan received. Not even Monsanto or WGI have raised such a dispute.

Monsanto and WGI, implicitly conceding the import of the other two Hart emails, argue that the district court's error was harmless because Hart's March 14, 2008, email does not say anything that the other two emails do not already say. That is not true. Hart's March 14, 2008, email clarifies the role of WGI in the SIO/Monsanto contract, specifically, to "facilitate this agreement." R. Vol. 4, pp. 439, 447–48. Hart's email cuts against the arguments of Monsanto and WGI that SIO's substantive contract was with WGI rather than Monsanto and creates an additional issue of material fact.

The standard employed by the district court appears to be exactly the opposite of the standard employed by Judge Winmill in *Collier v. Turner Indus. Group, LLC*, 797 F. Supp. 2d 1029 (D. Idaho 2011). There, Judge Winmill noted as follows:

> Only admissible evidence may be considered in ruling on a motion for summary judgment. In determining admissibility for summary judgment purposes, it is the contents of the evidence rather than its form that must be considered. *If the contents of the evidence could be presented in an admissible form at trial, those contents may be considered on summary judgment even if the evidence itself is hearsay.*

See id. at 1039 (emphasis added). Idaho's Rules of Evidence are, of course, patterned after the Federal Rules of Evidence "to obtain uniformity in the trial practice in both the state and federal courts." *See State v. Cannady*, 137 Idaho 67, 70, 44 P.3d 1122, 1125 (2002). There is no dispute—and the district court even acknowledged—that the evidence in question may be admissible as direct testimony. There is no reason for the district court to have failed to consider the March 14, 2008, email.

The exclusion of that email prejudices SIO's substantive rights and requires reversal.

III. CONCLUSION

For the foregoing reasons, the district court's awards of summary judgment to Monsanto and WGI should be reversed, the district court's awards of attorney fees and costs to Monsanto should be vacated, and this case should be remanded to the district court for further proceedings, including trial.

DATED this 25 day of July, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of July, 2012, I caused a true and correct copy of the foregoing **REPLY BRIEF OF PLAINTIFF/APPELLANT SILICON INTERNATIONAL ORE, LLC** to be served by the method indicated below, and addressed to the following:

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